

MacCormack (Migration) [2021] AATA 3115 (11 August 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Miss Jennifer May MacCormack
VISA APPLICANT:	Mr Thomas Coppen
CASE NUMBER:	1821426
DIBP REFERENCE(S):	BCC2017/1838124
MEMBER:	Linda Holub
DATE:	11 August 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211(2) of Schedule 2 to the Regulations • r.2.03A.

Statement made on 11 August 2021 at 1:59pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 Partner (Provisional) – de facto partner of the review applicant – genuine and ongoing relationship – companionship and emotional support – parties possibly adopting a child – joint assets and finances – joint travels – social integration of families – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, rr 1.09, 2.03; Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 6 June 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 24 May 2017 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa, need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because, having considered all the evidence and information provided, the delegate found it was not sufficient to demonstrate that the applicant is the spouse or de facto partner of the sponsor, as defined under section 5F and 5CB of the *Migration Act*.
4. The review applicant appeared before the Tribunal on 23 July 2021 to give evidence and present arguments. The Tribunal exercised its discretion to hold the hearing by video through the Microsoft Teams application. The Tribunal determined it was reasonable to hold a hearing in this manner, having regard to the fact that the review and visa applicants live in the UK, the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by video.
5. The Tribunal also received oral evidence from the visa applicant and the sponsor's sister.
6. No concerns were expressed by either the review or the visa applicant in regard to the hearing being conducted in this way nor was there any indication that they had any difficulty in understanding and responding to the questions being put. The Tribunal is satisfied that the parties were given a fair opportunity to give evidence and present arguments.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

8. The visa applicant is a British citizen born in April 1988. His sponsor was born in Australia in January 1990. At hearing she stated that she holds dual citizenship because her father is Irish.
9. In his application, the applicant declared that he has been in a de facto relationship with his sponsor since May 2014. Elsewhere on the application form, the applicant also stated that he committed to a de facto relationship with the sponsor in May 2014 having met her in February 2014 in London. Where she declared her relationship status, the sponsor declared that her de facto relationship began in May 2017. The Tribunal asked about this discrepancy at hearing. The sponsor stated that it was a human error. She stated that it may have occurred because they were completing the application form in 2017 so she may have inadvertently written that year

10. The applicant provided the Department with
- copies of his bank statements for the period 23 May to 23 June 2017 and for the sponsor 6 to 26 June 2017.
 - copies of utility and telecommunications invoices for periods in 2017.
 - copies of telephone records.
 - photographs of the couple in various settings with various people including family and friends.
 - Statutory Declarations – Form 888s from the sponsor’s sisters.
 - Samples of long social media messages between the parties from early in their relationship.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in the present case is whether the applicant and his sponsor were at the time of application in a genuine relationship and whether at the time of decision they continue to be in a genuine relationship.

Whether the parties are in a spouse or de facto relationship

12. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the de facto partner of the review applicant who is an Australian citizen.

Are the parties in a de facto relationship?

13. ‘De facto partner’ is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
14. In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant’s and review applicant’s household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
15. *Nature of persons’ commitment to each other*
16. In his application, the applicant declared that both parties have met all immediate family members multiple times and that they are committed to a long-standing life together. He declared that the sponsor gave up her job in 2015 to move across the country so they could live together and help maintain and strengthen their relationship further from that point.

17. The applicant wrote in his application that the parties moved in together on 10 August 2015 and that prior to that, they lived apart due to work commitments. He wrote that he worked in Bristol and that the sponsor lived in London prior to her relocation to Bristol.
18. The sponsor stated that the parties met when she attended a house party on 15 February 2014 with some work friends. She stated the visa applicant was there because he was a friend of the person hosting the party. The sponsor stated that on the following Monday he sent her a message. She stated that the relationship developed after that because they clicked together very easily.
19. The sponsor stated that the visa applicant was living in Bristol at the time and he would visit her in London. She stated that she worked crazy hours whereas the visa applicant worked Monday to Friday, so she travelled to Bristol less often. She stated that it was just over a year before they moved in together in August 2015. She told the Tribunal that it was a big decision for her because she had never lived with anyone and she had to move from London. She referred to the love and support she felt from the visa applicant and it was an easy and very comfortable relationship.
20. In relation to the degree of companionship and emotional support they draw from each other, the review applicant stated that she gets a bit nervous and anxious about things and tends to over-think issues. She told the Tribunal that the visa applicant settles her down. She stated that he is patient and is quite calming. She stated that she can talk to him about anything. She stated that from her perspective, the visa applicant can get stressed with work, and that has especially been the case during the Covid-19 pandemic. She stated that he is able to talk about it with her and that they communicate openly. She stated that once they have a discussion, he often feels better. She told the Tribunal that over time she realised that she only has to listen rather than respond and.
21. The sponsor stated that they want to move to Australia if the visa applicant is granted a visa and that want to buy a house with a little garden. She stated that they have discussed having children and it may be on the cards. She stated that if it happened, they would be happy, but they are not actively planning.
22. The visa applicant stated that the sponsor provides him with complete emotional support. He referred to some difficult times with work, and she has been there to support him. He stated that he only sees his future as a future with the sponsor.
23. The visa applicant stated that the sponsor gets anxious sometimes and he takes more stress off her. He told the Tribunal that that they support each other with their strengths. He referred to the stress the sponsor has felt due to her mother's health condition. He stated that she struggled with being away from family but that she committed to staying with him and that was very difficult for the sponsor. He stated that he cannot imagine his life without her.
24. The visa applicant stated that they plan to move to Australia and to buy a house. In relation to children, the visa applicant stated that they are considering possibly adopting a child later and referred to their reasons for considering this option. The Tribunal put this discrepancy to the sponsor. She stated that they had discussed adoption. She stated that consistent with her previous answer, if she were to fall pregnant, that would be fine but if they decide to proceed with a child, adoption would be their first choice.
25. A copy of the sponsor's mobile phone account statement for periods in 2020 and 2021.
26. The Tribunal has had the advantage of the oral evidence from the parties at hearing. They presented as open and honest and their evidence was straightforward and clear. The Tribunal heard consistent evidence about the development of the relationship. It was clear

they provide each other with emotional support and companionship which would be expected in a genuine relationship. They have provided realistic details of their plans and hopes for their future together in Australia. The Tribunal is satisfied as to the nature of the parties' commitment to each other.

27. *Financial aspects of the relationship*

28. At the time of application, the applicant declared that the parties use their joint bank account for all food purchases, eating out and social activities; that bills and rent payments are paid from the applicant's bank account into which the sponsor transfers a monthly payment to contribute to these aspects. It was stated that they jointly own their van.
29. In a letter to the Tribunal received on 27 July 2018, the visa applicant stated that he submitted bank statements to show the financial nature of the relationship prior to them opening their joint account in July 2016. He wrote that while they did not have a joint account prior to July 2016 they had the same financial arrangements noted in their original visa application for a significant time period prior to that date including April/May 2016. He highlighted transaction exchanges between the parties on the submitted bank statements.
30. In the July 2018 letter, the visa applicant stated that the parties used their joint bank account for dining out and household purchases such as food shopping. He wrote they have a gas and electric meter within the flat they live in and top these up manually on electric/gas meter cards via a local shop. He wrote that they sometimes draw from the joint account to top those up but, there are no physical statements generated from this method. He explained that the sponsor pays money into his account at least once a month from which he pays the mortgage on the property as he is the owner and some of the money goes towards some bills. He stated that he is main earner in the household, and he pays the larger share of outgoing costings.
31. In regard to ownership of their van, the visa applicant stated that there can only be one registered keeper of a van in the UK due to the law, but we have both worked on its conversion to a camper-van and use it together. Photographs were submitted from the day of purchase and early conversion work.
32. The Tribunal was provided with copies of the sponsor's pay slips for September 2020 and February and June 2021.
33. At the hearing the sponsor stated that when she first moved to Bristol, they lived in share accommodation and she paid the visa applicant rent. She stated that she paid about a third of the total rent. She stated they opened a joint account which they used for groceries. She stated that currently she pays for groceries and their activities out and the visa applicant pays the mortgage and electricity. She stated they have a verbal agreement about how they would split their finances
34. The sponsor stated that she currently works as a barista in a coffee shop in the centre of town from early morning until mid-afternoon. She stated that the visa applicant owns his online marketing business.
35. The Tribunal asked the sponsor about a number of transactions shown on the parties' joint bank account which she was able to explain. Her explanation was consistent with that of the visa applicant's.
36. After the hearing the applicant provided a statement which explained that both the sponsor and the visa applicant deposited money into their joint account weekly to help pay for things jointly including at local supermarkets for weekly food shop, meals out together, household

items, hire cars. The Tribunal was also provided with a joint bank account statement for the period 29 July 2016 until 28 June 2018. It shows a range of items purchased including grocery shopping and deposits from both the visa applicant and the sponsor.

37. The information and evidence provided as to the financial aspects of the relationship supports a finding that the parties are in a genuine relationship.

38. *Nature of the household*

39. In his application, the applicant declared that the parties live in a one bedroom flat and share a double bed. According to the application, they split the housework as fairly as possible.
40. On 27 July 2018, the visa applicant wrote that the written evidence provides further proof of the shared address. In addition, the Tribunal was provided with copies of utility accounts in the name of the visa applicant.
41. The sponsor told the Tribunal that when she moved in with the visa applicant in August 2015, he had a flat mate. She stated that when the flat mate moved out, they always tried to rent out one of the rooms which they did for about a year. Sometime later the visa applicant bought their current flat. She stated that the mortgage is in the visa applicant's name as she couldn't afford it at the time. She stated they had been talking about moving to Australia which financially, is a good idea for them.
42. The Tribunal was told they have lived in the current flat for the past 5 years. It has one bedroom, one living room and a small kitchen and bathroom. The Tribunal heard consistent evidence that most of the cooking and cleaning is done predominantly by the sponsor as she finishes work earlier. The visa applicant helps on the weekends and he does the washing up and takes the bins.
43. The Tribunal accepts the evidence as to the nature of the parties' household is consistent with the relationship claimed.

44. *Social aspects of the relationship*

45. The applicant wrote in his application that the parties socialise with friends as a couple and have regularly attended weddings and other social events as a couple. Both parties have met each other's parents on numerous occasions. He stated they have travelled to a number of countries together including Australia multiple times.
46. The parties provided photographs of themselves in various settings with various people over a number of years. Some of the photographs are annotated with dates and people and some are drawn from their social media accounts. They have included photographs of their van in which they travelled for an extended period.
47. The visa applicant commented to the very positive way in which the sponsor has connected with his friends and with his family. He stated she is close to his sister. He also referred to his own integration with the sponsor's family.
48. During the hearing the Tribunal referred to the statements of support that were provided. The Tribunal explained that the more recent statements were undated, unsigned and no identification information was provided. The Tribunal explained that it was unable to give them any weight. The Tribunal also commented on the fact that the parties did not propose any witnesses that could provide oral evidence during the hearing and was surprised at this.

49. The review applicant proposed that the Tribunal telephone her sister, Christine Brown to obtain oral evidence. Ms Brown took the call and was available to provide evidence.
50. Ms Brown stated that the visa applicant is part of family interactions in video calls and when the parties have visited and when she visited them in the UK. She stated she saw them living together. She referred to the length of time the sponsor has been in the UK and when she and the visa applicant first met. Ms Brown also made reference to when the parties moved in together. She stated that that she understood that the sponsor saw the relationship as being more serious because it was the first time the sponsor had lived with a partner. She told the Tribunal that the parties have been travelling together and during that time they sent lots of photos of their travel adventures including in the UK and Scotland. Ms Brown also talked about when her sister visited and stayed with the parties about two years ago. She stated the parties are jointly seen as part of the family and that the visa applicant has been part of the family for several years. She referred to the fact that they have common friends across friendship groups, and they both attended friends' weddings. She stated that she is aware that the sponsor is part of the visa applicant's extended family and referred to the sponsor having visited the visa applicant's new niece and nephew and Jennifer.
51. Following the hearing, the Tribunal was provided with updated, signed statements of support from family and friends with identification information in relation.
52. Ms Emma Redgrove who is a long-time friend initially of the sponsor and more recently of the couple, provided a detailed statement outlining the history of her friendship with the sponsor, when she became aware of the visa applicant and sponsor first meeting, the sort of social activities the parties undertook together when they first met, and referred to the time that she spent staying with them when she visited the UK. She stated that during the visit she witnessed them living as a couple. She also outlined the emotional support provided by the visa applicant to the sponsor when her mother was diagnosed with breast cancer.
53. Ms Holly Coppen who is the visa applicant's sister attested to the genuineness of the relationship between the parties and stated that they have been in a relationship since 2015. She referred to her first meeting the sponsor and when they visited her while she was expecting her first child. She stated that since then they have both visited and played host to her and her family on many occasions, including to celebrate birthdays, Christmas and general visits. She confirmed that the parties share all financial matters and have done so since moving in together in August of 2015 through to the present day and that she has witnessed them pay jointly for many things such as meals out, holidays and maintenance to their home.
54. Ms Liane Jones who was a former housemate of the parties and lived with them during 2016-2017 also provided a statement. She wrote that she had been living with the visa applicant for a number of years when he met the sponsor. She stated that from their first meeting the visa applicant had his heart set on sponsor. She referred to the specific date of when she first met the sponsor and when the sponsor moved into the unit in August 2015. She wrote that it was clear to her that they have shared finances, values, friends, a loving home, and all the things that accompany a committed relationship ever since they moved in together. This course covers the full period of 2016-2017 through to the present day.
55. The Statutory Declarations from the review applicant's sister provided to the Department outlined the history of the parties' relationship and gave depth insights into the visa applicant and the relationship between him and the review applicant.
56. The Tribunal is satisfied the parties represent themselves to other people as being in a de facto relationship with each other and that their family, friends and acquaintances accept they are a genuine couple and that they undertake joint social activities.

57. *Overall assessment*

58. On the basis of the evidence, the Tribunal is prepared to accept the parties have shared financial arrangements. The Tribunal is satisfied they undertake social activities and travel together and represent themselves to and are accepted by other people as being in a de facto relationship. The Tribunal is satisfied the parties commenced that relationship in May 2014 and commenced living together in August 2015. The Tribunal is satisfied they provide each other with companionship and support and consider the relationship as long-term.
59. Having considered all the evidence, the Tribunal is satisfied that the parties have a mutual commitment to a shared life to the exclusion of all others, they are in a genuine and continuing relationship and live together or not separately and apart on a permanent basis. There is nothing before the Tribunal to suggest the parties are related by family.
60. On the basis of the above, the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and the time of this decision.
61. Therefore, the visa applicant meets cl.309.211(2).

Are the additional criteria for a de facto relationship met?

62. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
63. The applicant must have been in the de facto relationship for at least the 12-month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
64. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12- month requirement.
65. Having considered the written and oral evidence the Tribunal has had regard to the fact that the parties met in February 2014 and were in a de facto relationship from May 2014 and commenced living together in August 2015. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12- month period ending immediately before the date of the application.
66. For these reasons the Tribunal is satisfied that the visa applicant meets the additional criteria prescribed in r.2.03A.
67. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

68.

69.

70.

DECISION

71. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211(2) of Schedule 2 to the Regulations
 - r.2.03A

Linda Holub
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).